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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1222

[Document Number AMS-FV-11-0069; FR-B]

RIN 0581-AD21

Paper and Paper-Based Packaging Promotion, Research and Information Order; Referendum Procedures

AGENCY: Agricultural Marketing Service.

ACTION: Final rule.

SUMMARY: This rule establishes procedures for conducting a referendum to determine whether issuance of a proposed Paper and Paper-Based Packaging Promotion, Research and Information Order (Order) is favored by manufacturers (domestic producers) and importers of paper and paper-based packaging. The procedures will also be used for any subsequent referendum under the Order. The proposed Order is being published separately in this issue of the **Federal Register**.

EFFECTIVE DATE: [Insert date 1 day after the date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION: This rule is issued pursuant to the Commodity Promotion, Research and Information Act of 1996 (1996 Act) (7 U.S.C. 7411-7425).

As part of this rulemaking process, two proposed rules were published in the **Federal Register** on January 2, 2013. One rule pertained to the proposed Order (78 FR 188) and a second rule pertained to proposed referendum procedures (78 FR 212). Both rules provided for 60-day comment periods ending on March 4, 2013. No comments were received regarding the referendum procedures. Seventy-five comments were received regarding the proposed Order. Those comments are addressed in another proposed rule published in this issue of the **Federal Register**.

Executive Order 12866 and Executive Order 13563

This rule regarding proposed referendum procedures has been determined to be non-significant for purposes of Executive Order 12866, as supplemented by Executive Order 13563, and therefore has not been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act provides that it shall not affect or preempt any other Federal or state law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the 1996 Act, a person subject to an order may file a written petition with the U.S. Department of Agriculture (USDA) stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

This rule establishes procedures for conducting a referendum to determine whether domestic manufacturers and importers of paper and paper-based packaging favor issuance of a proposed paper and paper-based packaging Order. The program would cover four types of paper and paper-based packaging - printing, writing and related paper, kraft packaging paper (used for products like grocery bags and sacks), containerboard (used to make shipping containers and related products), and paperboard (used for food and beverage packaging, tubes, and other miscellaneous products).

USDA will conduct the referendum. The program will be implemented if it is favored by a majority of current domestic manufacturers and importers of paper and paper-based packaging voting in the referendum who also represent a majority of the volume of paper and paper-based packaging represented in the referendum. The procedures will also be used for any subsequent referendum under the Order. The proposed Order is being published separately in this issue of the **Federal Register**.

The 1996 Act authorizes USDA to establish agricultural commodity research and promotion orders which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and

uses for agricultural commodities. As defined under section 513(1)(D) of the 1996 Act, agricultural commodities include the products of forestry, which includes paper and paper-based packaging.

The 1996 Act provides for alternatives within the terms of a variety of provisions. Paragraph (e) of section 518 of the 1996 Act provides three options for determining industry approval of a new research and promotion program: (1) by a majority of those persons voting; (2) by persons voting for approval who represent a majority of the volume of the agricultural commodity; or (3) by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity. In addition, section 518 of the 1996 Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under an order.

USDA received a proposal for a national research and promotion program for paper and paper-based packaging from the Paper and Paper-Based Packaging Panel (Panel). The Panel is a group of 14 industry members that was formed in May 2010 to oversee development of the program. The American Forest & Paper Association (AF&PA), a national trade association, provided technical assistance to the Panel. The program would be

financed by an assessment on paper and paper-based packaging domestic manufacturers and importers and would be administered by a board of industry members selected by the Secretary of Agriculture (Secretary). The assessment rate would initially be \$0.35 per short ton. (One short ton equals 2,000 pounds.) Entities that manufacture or import less than 100,000 short tons annually would be exempt. The purpose of the program would be to maintain and expand markets for paper and paper-based packaging.

The Panel proposed that a referendum be held among eligible domestic manufacturers and importers of paper and paper-based packaging to determine whether they favor implementation of the program prior to it going into effect. The Panel recommended that the program be implemented if it is favored by a majority of the domestic manufacturers and importers voting in the referendum who also represent a majority of the volume of paper and paper-based packaging represented in the referendum. Domestic manufacturers and importers who produce or import 100,000 short tons or more of paper and paper-based packaging annually are eligible to vote in the referendum.

Accordingly, this rule adds subpart B to part 1222 that establishes procedures for conducting the referendum. The procedures cover definitions, voting instructions, use of

subagents, ballots, the referendum report, and confidentiality of information. The procedures are applicable for the initial referendum and future referenda.

Final Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS is required to examine the impact of this final rule on small entities. Accordingly, AMS has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms (manufacturers and importers) as those having annual receipts of no more than \$7.0 million.

According to the AF&PA, in 2011, there were 84 manufacturers in the United States that produced one or more of the four types of paper and paper-based packaging to be covered under the proposed Order. According to U.S. Census data, the average value of paper and paper-based packaging exports in 2011 was approximately \$760 per short ton. Using an average price of

\$760 per short ton, a manufacturer who produced less than 9,210 short tons of paper and paper-based packaging per year would be considered a small entity because their annual receipts are less than \$7.0 million. It is estimated that no more than four manufacturers produced less than 9,210 short tons in 2011. Thus, the majority of manufacturers would not be considered small businesses.

According to Customs data, in 2011, there were about 2,612 importers of paper and paper-based packaging. Eighty-five importers, or about 3.2 percent, imported more than \$7.0 million worth of paper and paper-based packaging. Thus, the majority of importers would be considered small entities. However, no importer who imported 100,000 short tons or more (the Order's proposed exemption threshold) imported less than \$7.0 million worth of paper and paper-based packaging (19 importers). Therefore, none of the estimated 19 importers to be covered under the proposed Order would be considered small businesses.

According to AF&PA, it is estimated that, in 2011, about 68.5 million short tons of paper and paper-based packaging were produced domestically. Of the 68.5 million short tons, about 63.2 percent was manufactured in the South, 17.1 percent was

manufactured in the Midwest, 10.5 percent was manufactured in the Northeast, and 9.2 percent was manufactured in the West.¹

According to Customs data, in 2011, imports of paper and paper-based packaging to be covered under the program totaled 7.5 million short tons. Of that total, about 58.6 percent was from Canada, 22.2 percent from Western Europe, 9.8 percent was from China, Japan and the Far East, 2.7 percent was from South America and the remainder was from other countries.

This rule establishes procedures for conducting a referendum to determine whether domestic manufacturers and importers of paper and paper-based packaging favor issuance of a proposed Order. USDA will conduct the referendum. The program will be implemented if it is favored by a majority of domestic manufacturers and importers voting in a referendum who also represent a majority of paper and paper-based packaging represented in the referendum. The procedures will also be used for any subsequent referendum under the Order. The procedures are authorized under paragraph (e) of section 518 the 1996 Act.

Regarding the economic impact of this rule on affected entities, eligible domestic manufacturers and importers will have the opportunity to participate in the referendum. The Order would exempt domestic manufacturers and importers who

¹ Data was compiled by the AF&PA from the American Forest & Paper Association's 51st Annual Survey of Paper, Paperboard and Pulp, 2011.

produce or import less than 100,000 short tons annually from the payment of assessments. Exempt domestic manufacturers and importers are not eligible to participate in the referendum. Based on 2011 Customs data, of the 84 manufacturers and 2,612 importers, it is estimated that about 51 manufacturers and 19 importers would pay assessments under the Order and thus be eligible to vote in the referendum. For example, using 2011 data and deducting exempt tonnage, it is estimated that if 72.5 million short tons of paper and paper-based packaging (67.2 million short tons domestic and 5.3 million short tons imported) were assessed at a rate of \$0.35 per short ton, about \$25.4 million would be collected in assessments. Of that \$25.4 million, about 92.5 percent (\$23.5 million) would be paid by domestic manufacturers and 7.5 percent (\$1.9 million) would be paid by importers.

Voting in the referendum is optional. If domestic manufacturers and importers chose to vote, the burden of voting would be offset by the benefits of having the opportunity to vote on whether or not they want to be covered by the program.

Regarding alternatives, USDA considered requiring eligible voters to vote in person at various USDA offices across the country. USDA also considered electronic voting, but the use of computers is not universal. Conducting the referendum from one

central location by mail ballot will be more cost effective and reliable. USDA will provide easy access to information for potential voters through a toll free telephone line.

This action imposes an additional reporting burden on eligible domestic manufacturers and importers of paper and paper-based packaging. Eligible domestic manufacturers and importers will have the opportunity to complete and submit a ballot to USDA indicating whether or not they favor implementation of the proposed Order. The specific burden for the ballot is detailed later in this document in the section titled **Paperwork Reduction Act**. As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Finally, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Regarding outreach efforts, USDA will keep eligible domestic manufacturers and importers informed throughout the

program implementation and referendum process to ensure that they are aware of and are able to participate in the program implementation process. USDA will also publicize information regarding the referendum process so that trade associations and related industry media can be kept informed.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the referendum ballot, which represents the information collection and recordkeeping requirements that are imposed by this rule, has been submitted to OMB for approval and approved under OMB Number 0581-0282.

Title: Paper and Paper-Based Packaging Promotion, Research and Information (Referendum Procedures).

OMB Number: 0581-0282.

Expiration Date of Approval: 3 years from OMB date of approval.

Type of Request: New information collection for research and promotion programs.

Abstract: The information collection requirements in the request are essential to carry out the intent of the 1996 Act. The information collection concerns a proposal received by USDA for a national research and promotion program for paper and paper-based packaging. The program would be financed by an

assessment on domestic manufacturers and importers and would be administered by a board of industry members selected by the Secretary. The program would exempt domestic manufacturers and importers who produce or import less than 100,000 short tons of paper and paper-based packaging annually. A referendum will be held among eligible domestic manufacturers and importers to determine whether they favor implementation of the program prior to it going into effect. The purpose of the program would be to maintain and expand markets for paper and paper-based packaging.

The information collection requirements in this rule concern the referendum that will be held to determine whether the program is favored by the industry. Current domestic manufactures or importers that manufactured or imported 100,000 short tons or more of paper and paper-based packaging during the representative period are eligible to vote in the referendum. The ballot will be completed by eligible domestic manufacturers and importers who want to indicate whether or not they support implementation of the program.

REFERENDUM BALLOT

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

Respondents: Domestic manufacturers and importers.

Estimated Number of Respondents: 70 (51 domestic manufacturers and 19 importers).

Estimated Number of Responses per Respondent: 1 every 7 years (0.14).

Estimated Total Annual Burden on Respondents: 2.45 hours.

The ballot will be added to the other information collections approved under OMB No. 0581-0282.

An estimated 70 respondents would provide information to the Board (51 domestic manufacturers and 19 importers). The estimated cost of providing the information to the Board by respondents would be \$80.85. This total has been estimated by multiplying 2.45 total hours required for reporting and recordkeeping by \$33, the average mean hourly earnings of various occupations involved in keeping this information. Data for computation of this hourly rate was obtained from the U.S. Department of Labor statistics.

The proposed Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under other programs administered by USDA and other state programs.

A proposed rule regarding the referendum procedures was published in the **Federal Register** on January 2, 2013 (78 FR

212). Copies of the rule were mailed by USDA to all known domestic manufacturers and importers. The rule was also made available through the Internet by USDA and published in the Federal Register. That rule provided for a 60-day comment period. No comments were received.

In the January 2, 2013, proposed rule comments were also invited on the information collection requirements prescribed in the **Paperwork Reduction Act** section of this rule. Specifically, comments were solicited on: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the proposed Order and USDA's oversight of the proposed Order, including whether the information would have practical utility; (b) the accuracy of USDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) the accuracy of USDA's estimate of the principal manufacturing areas in the United States for paper and paper-based packaging; (d) the accuracy of USDA's estimate of the number of domestic manufacturers and importers that would be covered under the program; (e) ways to enhance the quality, utility, and clarity of the information to be collected; and (f) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic,

mechanical, or other technological collection techniques or other forms of information technology. No comments were received regarding information collection.

Pursuant to 5 U.S.C. 553, it is found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because this rule needs to be in effect prior to USDA conducting a referendum. Further, a 60-day comment period was provided for in the proposed rule regarding referendum procedures, and no comments were received.

List of Subjects in 7 CFR Part 1222

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Paper and paper-based packaging, Promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, Title 7, Chapter XI of the Code of Federal Regulations, is amended by adding part 1222 to read as follows:

PART 1222—PAPER AND PAPER-BASED PACKAGING PROMOTION, RESEARCH AND INFORMATION ORDER

Subpart A - [Reserved]

Subpart B—Referendum Procedures

Sec.

1222.100 General.

1222.101 Definitions.

1222.102 Voting.

1222.103 Instructions.

1222.104 Subagents.

1222.105 Ballots.

1222.106 Referendum report.

1222.107 Confidential information.

1222.108 OMB Control number.

Authority: 7 U.S.C. 7411-7425; 7 U.S.C. 7401.

Subpart A - [Reserved]

Subpart B—Referendum Procedures

§ 1222.100 General.

Referenda to determine whether eligible domestic manufacturers and importers favor the issuance, continuance, amendment, suspension, or termination of the Paper and Paper-Based Packaging Promotion, Research and Information Order shall be conducted in accordance with this subpart.

§ 1222.101 Definitions.

For the purposes of this subpart:

(a) Administrator means the Administrator of the Agricultural Marketing Service, with power to delegate, or any officer or employee of the U.S. Department of Agriculture to

whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) Converted products means products made from paper and paper-based packaging.

(c) Customs or CBP means the U.S. Customs and Border Protection, an agency of the U.S. Department of Homeland Security.

(d) Department or USDA means the U.S. Department of Agriculture or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

(e) Eligible domestic manufacturer or producer means any person who is currently a domestic manufacturer or producer and who manufactured 100,000 short tons or more of paper and paper-based packaging during the representative period.

(f) Eligible importer means any person who is currently an importer and who imported 100,000 short tons or more of paper and paper-based packaging into the United States during the representative period as a principal or as an agent, broker, or consignee of any person who manufactured paper and paper-based packaging outside of the United States for sale in the United States, and who is listed as the importer of record for such paper and paper-based packaging. Importation occurs when paper

and paper-based packaging manufactured outside of the United States is released from custody by Customs and introduced into the stream of commerce in the United States. Included are persons who hold title to foreign-manufactured paper and paper-based packaging immediately upon release by Customs, as well as any persons who act on behalf of others, as agents or brokers, to secure the release of paper and paper-based packaging from Customs when such paper and paper-based packaging is entered or withdrawn for use in the United States.

(g) Kraft process means a process that transforms wood into a high quality strong pulp for making paper and paper-based packaging.

(h) Linerboard means a grade of containerboard that is used as facing material in the manufacture of corrugated or solid fiber shipping boxes.

(i) Manufacture or produce means the process of transforming pulp into paper and paper-based packaging.

(j) Order means the Paper and Paper-Based Packaging Promotion, Research and Information Order.

(k) Paper and paper-based packaging means:

(1) Printing, writing and related paper, which is coated or uncoated paper that is subsequently converted into products used for printing, writing and other communication purposes, such as

file folders, envelopes, catalogues, magazines and brochures. For purposes of this Order, printing, writing and related paper includes thermal paper but does not include carbonless paper;

(2) Kraft packaging paper, which is coarse unbleached, semi-bleached or fully bleached grades of paper that are subsequently converted into products such as grocery bags, multiwall sacks, waxed paper and other products;

(3) Containerboard, which is all forms of linerboard and medium that is used to manufacture corrugated boxes, shipping containers and related products; and

(4) Paperboard, which is solid bleached kraft board, recycled board and unbleached kraft board that is subsequently converted into a wide variety of end uses, including folding boxes, food and beverage packaging, tubes, cans, and drums, and other miscellaneous products. Paperboard does not include construction-related products such as gypsum wallboard facings and panel board.

(5) For purposes of this Order, paper and paper-based packaging does not include tissue paper, newsprint or converted products.

(1) Person means any individual, group of individuals, partnership, corporation, association, cooperative, or any other

legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, a paper and paper-based packaging manufacturing entity as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So called "joint ventures" wherein one or more parties to an agreement, informal or otherwise, contributed land, facilities, capital, labor, management, equipment, or other services, or any variation of such contributions by two or more parties, so that it results in the manufacturing or importation of paper and paper-based packaging and the authority to transfer title to the paper and paper-based packaging so manufactured or imported.

(m) Referendum agent or agent means the individual or individuals designated by the Secretary to conduct the referendum.

(n) Representative period means the period designated by the Department.

(o) Short ton or ton means a measure of weight equal to 2,000 pounds.

(p) United States means collectively the 50 states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 1222.102 Voting.

(a) Each eligible domestic manufacturer and importer of paper and paper-based packaging shall be entitled to cast only one ballot in the referendum. However, each domestic manufacturer in a landlord/tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to manufacture paper and paper-based manufacturing, in which more than one of the parties is a domestic manufacturer or importer, shall be entitled to cast one ballot in the referendum covering only such domestic manufacturer or importer's share of ownership.

(b) Proxy voting is not authorized, but an officer or employee of an eligible corporate manufacturer or importer, or an administrator, executor, or trustee of an eligible entity may cast a ballot on behalf of such entity. Any individual so voting in a referendum shall certify that such individual is an officer or employee of the eligible entity, or an administrator, executive, or trustee of an eligible entity and that such individual has the authority to take such action. Upon request

of the referendum agent, the individual shall submit adequate evidence of such authority.

(c) A single entity who manufactures and imports paper and paper-based manufacturing may cast one vote in the referendum.

(d) All ballots are to be cast by mail or other means, as instructed by the Department.

§ 1222.103 Instructions.

The referendum agent shall conduct the referendum, in the manner provided in this subpart, under the supervision of the Administrator. The Administrator may prescribe additional instructions, consistent with the provisions of this subpart, to govern the procedure to be followed by the referendum agent.

Such agent shall:

(a) Determine the period during which ballots may be cast;

(b) Provide ballots and related material to be used in the referendum. The ballot shall provide for recording essential information, including that needed for ascertaining whether the person voting, or on whose behalf the vote is cast, is an eligible voter;

(c) Give reasonable public notice of the referendum:

(1) By using available media or public information sources, without incurring advertising expense, to publicize the dates, places, method of voting, eligibility requirements, and other

pertinent information. Such sources of publicity may include, but are not limited to, print and radio; and

(2) By such other means as the agent may deem advisable.

(d) Mail to eligible domestic manufacturers and importers whose names and addresses are known to the referendum agent, the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order. No person who claims to be eligible to vote shall be refused a ballot;

(e) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results in the presence of an agent of a third party authorized to monitor the referendum process;

(f) Prepare a report on the referendum; and

(g) Announce the results to the public.

§ 1222.104 Subagents.

The referendum agent may appoint any individual or individuals necessary or desirable to assist the agent in performing such agent's functions of this subpart. Each individual so appointed may be authorized by the agent to perform any or all of the functions which, in the absence of such appointment, shall be performed by the agent.

§ 1222.105 Ballots.

The referendum agent and subagents shall accept all ballots cast. However, if an agent or subagent deems that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefore, the results of any investigations made with respect thereto, and the disposition thereof. Ballots invalid under this subpart shall not be counted.

§ 1222.106 Referendum report.

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on the results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to the analysis of the referendum and its results.

§ 1222.107 Confidential information.

The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Order and the voter list shall be strictly confidential and shall not be disclosed.

§ 1222.108 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and

Budget pursuant to the Paperwork Reduction Act of 1995, 44

U.S.C. is OMB control number 0581-NEW.

Dated: September 10, 2013

Rex A. Barnes
Associate Administrator

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